2007 Legislative Amendments to the Indiana Code Relating to Banks, Trust Companies, Stock Savings Banks, Holding Companies, Corporate Fiduciaries, and Industrial Loan And Investment Companies

Effective July 1, 2007

Questions, Answers, and Administrative Interpretations

1. Why has the term "sound capital" been replaced with "capital and surplus" in The Indiana Financial Institutions Act and the Indiana Industrial Loan and Investment Act (the "Acts")?

Answer – The term "sound capital" as used in the Acts has become antiquated and is no longer used in many states and in the acts governing federal financial institutions. To replace "sound capital", the term "Capital and surplus" is now defined in the Acts at IC 28-1-1-3(10), IC 28-1-13-1.1 and IC 28-5-1-3. "Capital and surplus" (including the terms "unimpaired capital" and "unimpaired surplus") has the meaning set forth in 12 CFR 32.2.

"Capital and surplus" at 12 CFR 32.2 means--(1) A bank's Tier 1 and Tier 2 capital calculated under the OCC's risk-based capital standards set forth in Appendix A to 12 CFR part 3 as reported in the bank's Consolidated Report of Condition and Income filed under 12 U.S.C. 161; plus (2) The balance of a bank's allowance for loan and lease losses not included in the bank's Tier 2 capital, for purposes of the calculation of risk-based capital described in paragraph (b)(1) of this section, as reported in the bank's Call Report filed under 12 U.S.C. 161.

The difference between the two concepts - "sound capital" and "capital and surplus" - is that certain elements of an institution's Tier 1 and Tier 2 capital constitute "capital and surplus" but are not included in sound capital. Most notably, the undivided profits and allowances for loan and lease losses as well as other elements are used in calculating a state financial institution's capital and surplus. Consequently, in calculating under IC 28-1-11-5 and IC 28-1-11-3.1(b), the sum which can be invested in real estate and buildings for the convenient transaction of business, a bank may calculate 50% of its capital and surplus (taking into account such items as undivided profits and allowances for lease and loan losses) instead of 50% of its sound capital (the calculation of which does not include those items).

This change is consistent with federal and many other state laws, brings Indiana up-to-date in an important area and will ease the difficulty some state institutions have when acquiring additional real estate for expansions and branching.

2. What changes have been made to the change of control provisions?

Answer – In addition to language clarifying the definition of "control", the statute has been amended to add subsection (f) which specifies that change of control provisions found in subsection (a) do not apply to any transaction in which the Director of the DFI determines that the relative direct or beneficial ownership of the bank, trust company, stock savings bank, holding company, corporate fiduciary, or industrial loan and investment company does not change. [IC 28-1-2-23]

3. What changes have been made to the information required for a plan of exchange?

Answer - The plan of exchange must list all persons who are or who have been selected to become directors or officers of the holding company, a description of their principal occupations, a list of all offices and positions held by them during the past five (5) years, and information about whether any of them is under indictment for; has been convicted of; or has pleaded guilty or nolo contendere to a felony involving fraud, deceit, or misrepresentation under the laws of Indiana or any other jurisdiction. [IC 28-1-7.5-4]

4. What changes have been made relating to voting rights in connection with a plan of exchange?

Answer – Unless the articles of incorporation provide otherwise, each outstanding share of the bank, trust company, corporate fiduciary, or stock savings bank and, if the articles of incorporation of the holding company are to be amended in the plan, the holding company, is entitled to one (1) vote. Regardless of provisions relating to voting rights in the articles of incorporation, the holders of the outstanding shares of a class of the bank, trust company, corporate fiduciary, or stock savings bank and, if the articles of incorporation of the holding company are to be amended in the plan, the holding company are entitled to vote as a separate class on a proposed plan of exchange if the plan would:

(1) increase or decrease the aggregate number of authorized shares of the class;
(2) effect an exchange or reclassification of all or part of the shares of the class into shares of another class;
(3) effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;
(4) change the designation, rights, preferences, or limitations of all or part of the shares of the class;
(5) change the shares of all or part of the class into a different number of shares of the same class;
(6) create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;
(7) increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;

(8) limit or deny an existing preemptive right of all or part of the shares of the class; or
(9) cancel or otherwise affect rights to distributions or dividends that have accumulated but not yet been declared on all or part of the shares of the class. [IC 28-1-7.5-7]

This amendment parallels provisions in the Indiana Business Corporation Law which require amendment to the articles of incorporation to be submitted to shareholders as a group if one of the enumerated items will affect their shares.

5. What changes have been made relating to investments in New Market Tax Credits by banks by trust companies?

Answer – Equity investments qualifying for the new markets tax credits under 26 U.S.C. 45D may not generally exceed an aggregate investment of five percent (5%) of capital and surplus but are no longer subject to limitation that investment may not exceed two percent (2%) of capital and surplus in any one project. The bank or trust company may increase its aggregate investment to ten percent (10%) of capital and surplus if the Director of the DFI determines that the aggregate equity investment in excess of five percent (5%) of the capital and surplus of the bank or trust company will not pose a significant risk to the affected deposit insurance fund and the bank or trust company is adequately capitalized. However, in no case may the bank or trust company invest in an aggregate equity investments for new markets tax credits in excess of ten percent (10%) of the capital and surplus. [IC 28-1-11-3.1(d)]

6. What changes have been made to the statute allowing banks to transfer trust business among its affiliates?

Answer – The statute has been amended to permit other types of financial institutions other than banks to transfer blocks of trust business by board resolution among its affiliates. Under the amended statute, the following financial institutions may transfer blocks of trust business among its affiliates: banks, banks and trust companies, savings banks, trust companies, corporate fiduciaries, industrial loan and investment companies, savings associations, banks of discount and deposit and loan and trust and safe deposit companies. In addition, if any of these institutions is not under the control of a holding company, the institution's board of directors may effect the transfer directly by resolution of its board of directors. [IC 28-2-14-18]

7. What must a state-chartered bank, savings bank or savings association establish in order to prevail in a request from the DFI for a grant of parity?

Answer – The provisions of the Indiana Financial Institutions Act relating to parity between state and federal banks, savings banks and savings associations have been amended to make the procedure for requesting parity a four-step process involving analysis of the same four elements as has been previously required to establish federal preemption**.** The two elements already in the law on parity were determinations by the DFI that federal banks, savings banks or savings associations domiciled in Indiana possess the requested rights and privileges, and that the exercise of those rights and privileges would not adversely affect the safety and soundness of the bank, savings bank or savings association. Under the amended statute, the DFI will also consider if the of grant parity would result in an unacceptable curtailment of consumer protection. The DFI must also determine if the failure to grant parity will place the state-chartered bank, savings bank or savings association at an unacceptable competitive disadvantage. [IC 28-7-1-9.2]

8. What changes have been made to the residency requirements for directors?

Answer – The residency requirements for directors have been changed from at least three-fifths (3/5) to at least one-half (1/2) of the directors must reside in Indiana or within a distance of not to exceed fifty (50) miles of any office of the corporation of which the director is a director. [IC 28-13-9-2]